IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1877

FRANK VISERTO, JR., RICHARD ROCCO and JOSEPH SOLCE,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners Frank Viserto, Jr., Richard Rocco and Joseph Solce pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated March 21, 1979, which affirmed judgments of conviction of the United States District Court for the Eastern District of New York sentencing Petitioners to concurrent terms of imprisonment of fifteen years, with an additional special parole term of fifteen years on each count of a

three-count indictment charging them with conspiring to possess with intent to distribute and to distribute heroin, 21 U.S.C. § 846 (Count 1), and with possession with intent to distribute and distribution of heroin, 21 U.S.C. § 841(a)(1); 18 U.S.C. § 2 (Counts 2 and 3). Each Petitioner was also fined $25,000 on each count, for a cumulative total of $75,000. Petitioners are incarcerated under these sentences.

OPINIONS BELOW

The opinion of the court of appeals, not yet reported, is reprinted in the Appendix.

JURISDICTION

The decision of the court of appeals was rendered on March 21, 1979. A timely petition for rehearing and suggestion of the appropriateness of a rehearing *en banc* was denied on May 18, 1979.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals properly construed and applied Federal Rules of Evidence 404(b) and 403 in upholding admissibility of "other crimes" and "other bad acts" evidence irrelevant to issues tried by the jury.

2. Whether the court of appeals properly interpreted Federal Rule of Criminal Procedure 30 in upholding the giving of a supplemental instruction favorable to the government after the jury had deliberated at some length, which instruction was not requested

by the jury and introduced a theory of liability that counsel had not had the opportunity to argue.

3. Whether an indictment charging possession with intent to distribute and distribution of a controlled substance is duplicitious in violation of Federal Rule of Criminal Procedure 8 and the sixth amendment.

STATEMENT OF THE CASE

This case involved an alleged conspiracy to distribute between 75 and 100 kilograms of heroin between 1970 and 1975. The seriousness of the crimes for which Petitioners were convicted, and the public attitude—shared no doubt by members of the jury—towards the distribution of this substance highlight the importance of a reasoned approach to questions of evidence and fair procedure. This Court has never addressed the intent and meaning of Federal Rule of Evidence 404 (b), and this case presents an opportunity to provide guidance to the courts of appeals, whose opinions are in disarray.

Despite the allegations that large quantities of heroin were involved, neither Viserto, Rocco nor Solce was ever apprehended in possession of narcotics. Indeed, no narcotics were introduced in evidence in this case. There was testimony that narcotics were seized from some defendants, but these persons were never claimed by the government to have met Viserto, Rocco or Solce. The only narcotics containers ever tested for fingerprints were negative as to all three. The government's case rested, therefore, upon testimony of defendant Charles Ford, who agreed to cooperate with the government the night of his arrest, and one Norman Alexander, a convicted felon who bargained with the government to exchange testimony for leniency.

Ford testified that, beginning in 1970 and continuing into 1975, he purchased quantities of heroin from Viserto, who was sometimes accompanied by Rocco, Solce or both of them. He said that the heroin was distributed through defendant Garnet Johnson, one Jeffrey Jones, and (though not throughout the five-year period) Norman Alexander. Down the ladder of packaging and distribution were, according to Ford, the other defendants.

Alexander testified that he first saw Viserto, Rocco and Solce in 1972 when he began driving to make heroin pickups. Alexander admitted that he did not know the last name of the person identified at trial as Viserto, and that he first mentioned Viserto to federal authorities at the time he was negotiating his arrangement. Impeachment material reflected that Alexander might at one time have inaccurately described Viserto as dark and smooth-skinned. Alexander's prior descriptions of the man he identified as Solce also left something to be desired.

In an attempt to corroborate Ford and Alexander, the government offered evidence of other crimes and "bad acts," and testimony tending to establish that Viserto, Rocco and Solce knew some of their alleged co-conspirators. None of the three Petitioners suggested that they did not know Ford, and cross-examination focused upon Ford's and Viserto's mutual fondness for gambling. The government's efforts to prove that Viserto, Rocco and Solce were "bad men" who might very well have committed serious crimes fell into several familiar categories:

1. Owners of a gas station in Long Island City testified that Viserto, Rocco and Solce patronized their

business, and that Viserto introduced Charles Ford to them as "a friend". Ford thereafter became a customer and in turn introduced some of the other defendants as customers. Alexander visited the gas station and at one time saw Solce there. This evidence was not disputed. Ford owned a used car lot at one time, and the gas station did repairs on cars owned by that business. One of the station owners, Mapp, testified that Rocco and Solce came by in about 1975 looking for Ford, claiming he owed them money. Assistant United States Attorney Scotti pointedly asked gas station owner Mapp if Rocco or Solce had displayed a gun to him during their search for Ford in 1975, and received an unequivocal "no".[1] Mapp also said that Ford had himself conceded in 1975 that Rocco loaned him money. There was evidence that Viserto and Ford did gamble, apparently for high stakes.

2. Witnesses testified that Solce and Viserto had large quantities of cash during 1970 and 1971. Most of the cash, several tens of thousands of dollars, was shown to have been in Solce's possession. Viserto was shown to have been involved in several thousand dollars worth of cash purchases. The introduction of this evidence was vigorously contested by the trial counsel, who contended that it went to no disputed issue of fact, in that Petitioners impliedly conceded access to cash through their gambling activities. Moreover, some of the witnesses called on this point had already testified at Solce's net worth tax evasion trial in the Eastern District of New York. Solce was acquitted in that case, which charged two counts under 26 U.S.C. § 7201 for his 1970 and 1971 tax returns. *United States* v. *Joseph*

[1] The trial judge properly admonished the jury, but the damage had been done.

P. Solce, 77 CR 225. Solce had, at the earlier trial, admitted receipt of unreported income in about the amounts claimed by the government but thought that because the income was from gambling winnings that it was not reportable. In yet another tax case, in the Southern District, *United States* v. *Musoff, Viserto, Solce and Rocco,* 77 CR 895, Petitioners were acquitted of conspiring to evade taxes they owed for 1975, and attempting to evade taxes for the same year. The trial judge, having let in the evidence of cash, would not permit the prior acquittals to be proven.

3. Ford testified that Viserto gave him guns. Now, Viserto had been acquitted on a firearms charge in Florida, *United States* v. *Chierco, Amatto and Viserto,* No. 77-18-Orl-Cr-R, Middle District of Florida, Orlando Division, and had pending at the time a state gun charge in New Jersey to which he has since pleaded guilty and received a sentence of three to five years concurrent with his sentence in this case. But Ford's testimony was the only link between Viserto and guns in this case; the prejudicial impact of this bit of evidence was enhanced when the government sought to link other defendants to specific acts of violence. This testimony was in turn heightened by evidence that some other defendants had engaged in violence to collect from their customers, including Alexander's picturesque description of using a machete for enforcement work. None of the jury evidence that weapons were actually used related to Viserto, Rocco or Solce.

4. The indictment was returned September 27, 1977. On October 6, 1977, DEA Agent Roger Garay left a party at the Holiday Inn in Manhattan at about 11:00 P.M. and drove to a newsstand at 53rd Street and Second Avenue. Garay had been to this newsstand

before, and went there on this occasion to "look around". He spotted Solce, Rocco, Viserto, and some others near an Italian restaurant. Viserto was walking with a man Garay said he later identified as Paul Caiano, and Garay overheard Caiano say, "We can't lose him as a customer, we have to make it up to him," to which Viserto replied, "All right, don't worry." Garay testified that he climbed into his car, huddled on the floor and that by the most fortuitous of coincidence Rocco came and sat on the fender of his car and had the following conversation with Viserto: "Frankie, we have had this guy as a customer for five years. It's always been $25,000 a key. What is wrong?" Viserto assertedly responded: "I will meet you back here at nine." Garay then asked for assistance with the surveillance, but his testimony did not reveal that anything further happened that evening which seemed worthy of mentioning. Cross-examination revealed that Garay was instrumental in enlisting Alexander as a government witness, and in turning Ford, whom he had arrested on this indictment. Trial counsel vigorously protested admission of Garay's testimony, noting that the alleged event post-dated the indictment by days and the alleged conspiracy by years. Moreover, Garay's reports of the incident, though they contained the alleged words of Rocco and Viserto, were withheld from the defense until after trial began despite earlier requests for all such material.

5. Another bit of alleged corroboration, also properly objected to, appeared in the person of Thomas Murray, a veteran of the witness protection program who had been receiving $600 per month for his help in another case. Murray testified that he met Viserto at the Corner Lounge Bar in New Rochelle in 1971.

When confronted with the fact stipulated by the government, that the bar had gone out of business in 1969, Murray decided he had met Viserto in 1968, and then had seen him again in 1971. Murray testified that, in the company of his partner in the narcotics business Joseph Barone, he bought heroin from Viserto in 1971 and in 1973 in a Bronx bar where Viserto's father worked. Viserto, according to Murray, went and got the packages of heroin and handed them over right in the bar. The defense, faced with this testimony, was required to confront it, though to do so compounded the jury's confusion. Barone, called as a defense witness and testifying for the first time in any court proceeding (he had pleaded guilty on a previous occasion and served his sentence), testified that he had never met Frank Viserto, Jr. He admitted meeting Frank Viserto, Sr., but said he never got any packages from him.

The Giving Of A Supplemental Instruction On Possession.

On the third day of deliberations, the jury requested by note to the court a reading of the charge on Count 2 and "the law on circumstantial evidence in regard to the verdict."[2] The prosecutor then requested the court charge on constructive, as well as actual, possession. The trial judge had not, in his pre-deliberation charge, instructed on constructive possession. The government's request was apparently without any prior notice to counsel, and *ex parte*. Counsel for defendant Solce protested that the jury had only asked for "the charge on Count 2". The trial judge responded, incorrectly, that the jury had "asked for the law on Count 2". Following upon that misapprehension, and the prosecutor's request, the trial judge decided to ask the jury whether they wanted a definition of terms and whether they wanted a definition of the term possession.

[2] "We want to hear your charge on this count. We would like to hear the law on circumstantial evidence in regard to the verdict so all jurors have this clear in their minds."

No text of the proposed supplemental instruction on possession had been provided—orally or in writing—to the attorneys for the defendants Viserto, Rocco and Solce. An objection to a supplemental charge was made on behalf of Mr. Solce before it was given, the court apparently treating the objection as if made by counsel for all three Petitioners. Counsel requested that if the government's desired charge on possession were to be given, that the term "reasonable doubt" be defined as well. The trial judge refused to define "reasonable doubt" and, after further request, declined to ask the jury if they wanted that term defined. The trial judge then *informed* the jurors that they wanted a definition of the terms that he had used. He asked the jurors if they wanted a definition of possession. Two of them answered the query, one saying yes and the other saying "no, sir". The jury was thereafter charged as to the definition of "possession," the charge reproducing that to be found in *Federal Jury Practice & Instructions,* Devitt and Blackmar § 16.07. (3d ed. 1977) The Court did not charge on the definition of reasonable doubt nor upon the government's burden of proof. The charge as given contained no instruction that mere presence in the vicinity of the contraband would not support the finding of possession.[3]

[3] Counsel had argued in summation that the defendants Rocco, Solce and Viserto were professional gamblers and money lenders and had met repeatedly with government witness Ford (a self-

[footnote continued]

After the supplemental charge, counsel for the three affected defendants again objected. They specified that they had not been given an opportunity to object to the charge (which they had neither seen nor heard before it was actually delivered), and that they were entitled to be aware that such a charge would be given before closing argument. Counsel for Mr. Solce specifically pointed out that the supplemental charge had not been requested by the jury, and that the judge had lent "the weight of authority" to his suggestion that the term be defined.

The Court's Charge And Counts 2 And 3.

Counts 2 and 3 each charge distribution and possession with intent to distribute. The court, at two points in its jury instructions, so characterized the charges. Then, in explaining the elements of the offense, the court focused only on possession with intent to distribute. When objection was taken to this instruction, the court stated that it had a problem with the conjunctive form of Counts 2 and 3, conceded that the charge was "awkward," and declined to change it.

REASONS FOR GRANTING THE WRIT

I. "Other Crimes" And "Other Bad Acts" Evidence.

No rule of evidence has been a more fecund source of appellate litigation than Rule 404(b):

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show

admitted heroin dealer) in connection with gambling and associated activity. The trial judge had informed the jury in his charge that this was the position of the three defendants. Neither definition of "possession" nor a *caveat* about "mere presence" was delivered in the original charge.

> that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

Some of the courts of appeals have read Rule 404(b) so broadly as to invite trial courts and juries to say, echoing A.P. Herbert's fictitious Lord Chief Justice:

> "It is not for me to say what offence the appellant has committed, but I am satisfied that he has committed *some* offence, for which he has been most properly punished."

A.P. Herbert, *Uncommon Law* 28 (1935).

For these reasons, the Rule requires interpretation by this Court.

Rule 404(b), correctly viewed, must be read in connection with Federal Rule of Evidence 403. That is, the trial judge must first determine whether Rule 404(b) bars admissibility, then exercise discretion in light of Rule 403. *See, e.g., United States* v. *Benedetto,* 571 F.2d 1246, 1251 (2d Cir.), *cert. denied,* ___ U.S. ___ (1978); *United States* v. *Gubelman,* 571 F.2d 1252, 1256 (2d Cir.), *cert. denied,* 436 U.S. 948 (1978); *United States* v. *Robinson,* 560 F.2d 507 (2d Cir. 1977) (*en banc*), *cert. denied,* 435 U.S. 905 (1978); *United States* v. *Corey,* 566 F.2d 429, 431 (2d Cir. 1977).

Emphasizing as it does the wise use of discretion, Rule 403 is perhaps not subject to a definitive "interpretation". The same cannot be said of Rule 404(b). One is at a loss, therefore, to explain the disarray in which the courts of appeals find themselves. The Second Circuit, echoed by the Third, *e.g., United States* v.

Long, 574 F.2d 761, 766 (3d Cir.), *cert. denied,* ___ U.S. ___ (1978), and Ninth, *e.g., United States* v. *Hearst,* 563 F.2d 1331, 1336 n.3 (9th Cir. 1977), *cert. denied,* 435 U.S. 1000 (1978), Circuits, has stressed its commitment to the "inclusory," *United States* v. *Williams,* 577 F.2d 188, 192 (2d Cir. 1978), or "inclusionary," *United States* v. *Benedetto, supra,* 571 F.2d at 1248; *United States* v. *O'Connor,* 580 F.2d 38 (2d Cir. 1978), form of the other crimes doctrine encapsulated in Rule 404(b), claiming support from Judge Weinstein's treatise in so doing. 2 Weinstein, *Evidence* ¶404[08], at 404-41.

The Fifth Circuit formerly took a less expansive view, *United States* v. *Broadway,* 477 F.2d 991 (5th Cir. 1973), but in a recent *en banc* decision has expanded the reach of Rule 404(b) almost beyond recognition. *United States* v. *Beechum,* 582 F.2d 898 (5th Cir. 1978), *cert. denied,* ___ U.S. ___ (1979).

Judge Weinstein may be correct that Rule 404(b) encapsulates some prior federal practice (2 *Id.* at pp. 404-41) but he is wrong in implying that the prior practice was consistent among the circuits. The cases cited above reveal the differences among the courts of appeals, and one might add that the District of Columbia Circuit has apparently decided not to decide, *see Bradley* v. *United States,* 433 F.2d 1113, 1118 n.18 (D.C. Cir. 1969). *Compare Drew* v. *United States,* 331 F.2d 85 (D.C. Cir. 1964). The Eighth Circuit has two contradictory lines of "other crimes" authority, with virtually no cross-citation between them. A "test" was established in *United States* v. *Clemons,* 503 F.2d 486, 489 (8th Cir. 1974), echoing the earlier law of the Fifth Circuit. *Compare, e.g., United States* v. *Weir,* 575 F.2d 668 (8th Cir. 1978) (reversing a conviction where threats

to assassinate an informant were admitted; *Clemons* not cited), and *United States* v. *Jones,* 570 F.2d 765 (8th Cir. 1978) (reversing the conviction of a physician for distribution of narcotics by prescription when other similar narcotic prescriptions were admitted; *Clemons* cited), with, *e.g., United States* v. *Bohr,* 581 F.2d 1294 (8th Cir.), *cert. denied,* ___ U.S. ___ (1978) (affirming conviction for wire fraud where similar criminal act was relevant to identity under Rule 404(b); *Clemons* cited), and *United States* v. *Adcock,* 558 F.2d 397 (8th Cir.), *cert. denied,* 434 U.S. 921 (1977) (affirming Hobbs Act conviction where similar criminal acts established "intent;" *Clemons* not cited).

It cannot be said that Rule 404(b) adopts the broadest available formulation of the "other crimes" rule. *Compare, e.g.,* Model Code of Evidence Rule 311, as quoted by McCormick, *Evidence* § 157 at 327 n.2:

> . . . evidence that a person committed a crime or civil wrong on a specified occasion is inadmissible as tending to prove that he committed a crime or civil wrong on another occasion if, but only if, the evidence is relevant solely as tending to prove his disposition to commit such a crime or civil wrong or to commit crimes or civil wrongs generally.

Rule 404(b), by contrast, is closer to the Uniform Rules, and the California Evidence Code § 1101(b).

This case provides some opportunity to resolve the conflicts and to address an issue which has become of great importance in the proper administration of criminal justice. This record is replete with "other crimes" questions of the sort which have caused the courts of appeals so much difficulty.

The evidence of guns, by allusion and by direct reference, was upheld by the court below on a rationale

at variance with that adopted by the Tenth Circuit, in *United States* v. *Warledo*, 557 F.2d 721 (10th Cir. 1977).

The evidence of cash, viewed in light of Solce's prior acquittal of a tax charge in which the same witnesses testified prompts consideration of an issue already addressed by the highest court of the state. Weinstein's treatise quotes these words from *State* v. *Little*, 87 Ariz. 295, 350 P. 756 (1969):

> The fact of an acquittal, we feel, when added to the tendency of such evidence to prove the defendant's bad character and criminal propensities, lowers the scale to the side of inadmissibility of such evidence. The factors which lead us to this balancing may, perhaps, not be subject to precise articulation, but we note two points . . . the relevance of the evidence of the prior offense depends upon the court's or jury's drawing two separate inferences, thus lessening the probative weight of such evidence; where the significance of such evidence must, if the doctrine of res judicata or collateral estoppel is to be given any effect, be determined in the light of the record and verdict of the former trial, the evidence of such former offense tends to become remote, speculative or confusing.

See 2 Weinstein, *Evidence* ¶404[09] at 404-47-48.

The evidence of the conversation in the vicinity of an Italian restaurant is redolent of the sort of "bad character" prejudice which has ever been of concern in interpreting the "other crimes" rule.

In sum, there has arisen a clear and present danger that federal criminal trials, now already lengthened by liberal rules for joinder of offenses and defendants, will become even more burdened by a runaway interpretation of Rule 404(b) contrary to its intent and language. Wigmore, ever the champion of letting all the evidence

in for the jury to hear, still cautioned against "confusion," the danger that:

> In attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instance and the similarity of conditions, new witnesses will be needed whose cross-examination and impeachment may lead to further issues; and that thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that the jury will lose sight of the main issue, and the whole evidence will be only a mass of confused data from which it will be difficult to extract the kernel of controversy.

2. Wigmore, *Evidence* § 443 at 428 (3d ed. 1940).

This case provides an opportunity to chart a path for the federal courts to follow.

II. Supplemental Charge

For the trial judge to give a supplemental instruction well into the jury's deliberations, introducing a wholly new theory of criminal liability on the issue of possession, raises questions under this Court's decisions concerning the constitutional right to summation, and under Federal Rule of Criminal Procedure 30.[4]

A great object of the criminal rules has been to promote uniformity, yet in counsel's experience the admonition of Rule 30 that the court rule on requests to charge prior to argument is subject to widely varying interpretations in the federal district courts. From

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[4] Federal Rule of Criminal Procedure 30 is virtually identical to Federal Rule of Civil Procedure 51, and the question here presented has arisen in civil cases. *See, e.g., Delano* v. *Kitch*, 542 F.2d 550 (10th Cir. 1976), for a particularly cogent statement of the problem.

counsel's point of view, the better practice is to give counsel a copy of the entire charge before argument, so that summation may weave together facts and law in coherent fashion.[5] Other courts simply rule on requests to charge one by one, leaving counsel unaware of what the actual instructions will be.

At a minimum, counsel must know the *theory* on which the jury may permissibly impose criminal liability. In this case, the charge as originally given would not, fairly read, have permitted the jury to find Petitioners guilty on a theory of constructive possession. The supplemental charge emphasized that theory which counsel had not had an opportunity to argue. The problem was compounded because the trial court refused to balance the supplemental instruction with a "mere presence" admonition of the kind set forth, *e.g.*, in 1 Devitt & Blackmar, *Federal Jury Practice & Instructions* § 12.05 (3d ed. 1977), and based in part upon this Court's decision in *United States* v. *DiRe,* 332 U.S. 581, 593 (1948).

In construing Rule 30, the due process clause and the sixth amendment right to summation, the following guidelines are, we submit, appropriate: (a) the charge must be given, in writing, to counsel prior to summation; (b) no new theories of liability may be introduced by supplemental instructions unless reargument is permitted on such issues; (c) any supplemental charge must be balanced, and include at a minimum a

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[5] Justice Holmes has written:

> "The mark of a master is, that facts which before lay scattered in an inorganic mass, when he shoots through them the magnetic current of his thought, leap into an organic order, and live and bear fruit."

Holmes, *Collected Legal Papers* 37 (1920).

restatement of the government's burden of proof. These principles, though they ostensibly involve only the interpretation of a rule of criminal procedure, trace deep roots in the right to a fair trial, and are worthy of consideration by this Court.

After all, the sixth amendment right to assistance of counsel includes the right to closing argument, "the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Herring* v. *New York,* 422 U.S. 853, 862 (1975). The *content* of that right has been described by the Maryland Court of Appeals in *Yopps* v. *State,* 228 Md. 204, 178 A.2d 879 (1962) in words quoted with approval in *Herring, supra,* at 860:

> The Constitutional right of a defendant to be heard through counsel necessarily includes his right to have his counsel make a proper argument on the evidence and the applicable law in his favor . . . and the trial court has no discretion to deny the accused such right.

Id. at 207, 178 A.2d at 881.

"Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach* v. *United States,* 326 U.S. 607, 612 (1946). "Special care must be exercised in framing supplemental instructions if prejudice to the defendant is to be avoided." *Powell* v. *United States,* 347 F.2d 156, 158 n.3 (9th Cir. 1965); *United States* v. *Louie Gim Hall,* 245 F.2d 338 (2d Cir. 1957).

The Fifth Circuit has also spoken to this issue in *United States* v. *Sutherland,* 428 F.2d 1152, 1157-58 (5th Cir. 1970), *cert. denied,* 409 U.S. 1078 (1972).

III. Duplicity

Counts 2 and 3 of the indictment charge substantive violations of 21 U.S.C. § 841(a)(1) for the period January-June 1973 and August-September 1973. The charging part of each count alleges that Petitioners:

> "... did knowingly and intentionally distribute and possess with intent to distribute ... heroin. ..."

At trial, the government's proof was intended to show that Viserto, Rocco and Solce occupied important positions in a widespread narcotics operation involving substantial quantities of heroin. Evidence that any of the three actually possessed heroin was sharply contested, presenting at the very least a real jury question on this issue.

It is also important to note that Counts 2 and 3 refer to 18 U.S.C. § 2, inviting the jury to convict any Petitioner it found to have aided and abetted either distribution or possession with intent to distribute. Each of Counts 2 and 3 is, therefore, capable of at least eight different readings, and neither the trial judge's charge nor the jury's general verdict gives any guidance as to which one the jury adopted or, importantly, as to whether some jurors voted on one theory and some on another.

To be sure, Federal Rule of Criminal Procedure 7(c)(1) permits pleading that the defendants committed the offense by "one or more specified means". Federal Rule of Criminal Procedure 8(a) requires that separate offenses be set forth in separate counts.

The decision whether a conjunctive allegation of possession and distribution violates the federal rules and sixth amendment apprisal requirement, *see generally Russell* v. *United States,* 369 U.S. 749 (1962),

rests upon an interpretation of the underlying statute in light of the facts of a particular case. The offenses of distribution and possession with intent to distribute may involve very different conduct. *See,* for example, *United States* v. *Jackson,* 526 U.S. 1236 (5th Cir. 1976),[6] on the other hand, a single incommutable act such as handling a quantity of narcotics to a government agent may involve violation of the prohibitions on possession with intent and on distribution. *See, e.g., United States* v. *Orzechowski,* 547 F.2d 978 (7th Cir. 1976), *cert. denied,* 431 U.S. 906 (1977); *compare United States* v. *Oropeza,* 564 F.2d 316 (9th Cir. 1977), *cert. denied,* 434 U.S. 1080 (1978). *See also United States* v. *Curry,* 512 F.2d 1299 (4th Cir.), *cert. denied,* 423 U.S. 832 (1975).

The general problem of duplicity has not been directly addressed by this Court in recent years, and proper interpretation of 21 U.S.C. § 841(a)(1) requires consideration as well, so that prosecutors and trial courts may know the proper unit of accountability under the statute.

There is no danger of improvident acquittals through mistaken pleadings if the offense of distribu-

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[6] 2 Devitt & Blackmar, *Federal Jury Practice & Instructions,* §§ 58.01-58.03, 58.09-58.11 (3d ed. 1977) is relevant here, for the authors take great care to list separately the elements of distribution and possession with intent in different sections. Other than in the "hand-to-hand" situation, these two offenses are quite distinct as to proof. This is particularly so because "possession" has, with the advent of § 841(a)(1), lost its former status as the basis for a number of the "presumptions" which were an integral part of the former 21 U.S.C. § 741. If the government should allege the offenses in separate counts, it would either be compelled to elect; or, at a minimum, sentences could not be imposed for both when the possession was part of a distribution enterprise.

tion and of possession with intent to distribute should be regarded as separate, rather than as different means of committing the same offense. The prosecutor could plead the offenses in separate counts and the jury be instructed that it could return a verdict of guilty only on one of the counts with respect to a particular transaction. *See Sanabria* v. *United States,* 437 U.S. 54 (1978).

The lower federal courts have addressed the issue of duplicity in a number of contexts although their opinions do not speak with a single voice. The ablest recent summary of the law, citing all the relevant cases, is *United States* v. *Kearney,* 444 F. Supp. 1290 (S.D.N.Y. 1978).

On this record, the question is presented not only as a matter of statutory interpretation, but in the context of facts which point up the difficulty inherent in the mode of pleading adopted here, and highlighted by the trial court's failure to give the jury any guidance.[7]

In sum, this case presents an opportunity to interpret the oft-used provisions of 21 U.S.C. § 841(a)(1), to restate the important problems of apprisal for jury unanimity[8] in this context, and to harmonize the provisions of Federal Rules of Criminal Procedure 8(a) and 7(c)(1).

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[7] The trial judge conceded that his charge was "awkward," and the record reflects that he failed to tell the jury that it had to be unanimous on some single theory of liability.

[8] *Andres* v. *United States,* 333 U.S. 740, 748-49 (1948).

CONCLUSION

For all of the above reasons, it is respectfully prayed that the writ for certiorari be granted.

Respectfully submitted,

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Dated: June 18, 1979

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 476-482—August Term, 1978.

(Argued December 18, 1978 Decided March 21, 1979.)

Docket Nos. 78-1281-3; 78-1305-8

UNITED STATES OF AMERICA,

Appellee,

—against—

FRANK VISERTO, JR., RICHARD ROCCO, JOSEPH SOLCE, GARNET JOHNSON, SARAH PAYNE, HOWARD WILLIAMS and PRENTISS COVINGTON,

Defendants-Appellants.

Before:

FEINBERG, MULLIGAN and GURFEIN,

Circuit Judges.

Appeal from judgments of conviction by the United States District Court for the Eastern District of New York (Honorable Jacob Mishler, *Chief Judge*) after a jury trial for violations of 21 U.S.C. §§ 841(a)(1), 846 and 18 U.S.C. § 2 in connection with a narcotics distribution enterprise. The Court of Appeals held that all points of error lacked merit, specifically those concerning admission of allegedly prejudicial evidence, the alleged insufficiency of pre-trial discovery, the allegedly duplicitous nature of the indictment, the court's supplemental charge on constructive

possession, and a challenge to the procedure for the selection of alternate jurors.

All convictions affirmed.

MICHAEL E. TIGAR, Washington, D.C., *for Appellants Viserto, Rocco and Solce.*

JULES SACK, Brooklyn, N.Y., *for Appellant Payne.*

LAWRENCE HOCHHEISER, New York, N.Y. (Donald E. Nawi, New York, N.Y., of counsel), *for Appellant Covington.*

GARY R. SUNDEN, New York, N.Y., *for Appellant Williams.*

RICHARD I. ROSENKRANZ, Brooklyn, N.Y., *for Appellant Johnson.*

GAVIN W. SCOTTI, Assistant United States Attorney, Eastern District of New York (Edward R. Korman, United States Attorney, and Mary McGowan Davis, Assistant United States Attorney, Eastern District of New York, of counsel), *for Appellee.*

GURFEIN, *Circuit Judge*:

The several appellants in this multi-defendant case appeal from judgments of conviction (Hon. Jacob Mishler, Chief Judge) entered after a jury trial for violations of the federal narcotics laws. After full consideration of the numerous arguments raised on appeal, we find them all to be without merit. Accordingly, we affirm.

I

The trial below involved ten defendants, seven of whom have appealed.[1] Count One charged all the defendants with conspiracy to distribute and to possess with intent to distribute heroin in violation of 21 U.S.C. § 846 between January 1970 and September 1975. Counts Two and Three charged appellants Viserto, Rocco and Solce with distribution and possession with intent to distribute heroin in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. Count Two charged possession of approximately 25 kilograms of heroin from January to June 1973; and Count Three alleged possession of approximately 50 kilograms of heroin from August to September 1973. Although none of the appellants directly challenges the sufficiency of the evidence, we shall summarize briefly the facts proved at trial.

The Government's case relied primarily on the testimony of two alleged co-conspirators, Charles Ford and Norman Alexander. The evidence, viewing it most favorably to the Government, showed the following. Ford testified that he met appellants Viserto and Rocco (and later Solce) in early 1970, and that he agreed to begin street distribution of heroin supplied to him by Viserto. Ford's operation proved successful. By September 1970 Ford had paid Viserto over $57,000 for heroin and was purchasing from him at a rate of ½ kilogram every 1½ months at a price of $10,000 per half-kilogram. During 1971 Ford's distribution network

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1 The three defendants who are not parties to this appeal are Mary Keith, James Shell, and James Brodies. Chief Judge Mishler granted Keith's motion to dismiss Count One against her after the Government rested its case. Shell was acquitted, and the jury declared itself deadlocked as to Brodies. A mistrial was declared and the indictment was dismissed as to Brodies upon the Government's motion on July 21, 1978. Two other defendants, Charles Ford and Benny Thomas, entered guilty pleas prior to trial. The appellants are Frank Viserto, Jr., Richard Rocco, Joseph Solce, Garnet Johnson, Sarah Payne, Howard Williams, and Prentiss Covington.

continued to grow, so that by 1972 he was purchasing between three and eight kilograms at a time from Viserto. Ford estimated that he paid Viserto approximately $1 million for the heroin he purchased during 1972.

The business continued through June 1973, at which time Ford testified that he attempted to bring his dealings with Viserto to an end. He was persuaded to continue, however, and in August or September 1973, after several meetings with Viserto and one with Rocco and Solce, Ford agreed to purchase 50 kilograms of heroin in a single shipment, at a cost of $25,000 per kilogram. This heroin was sold by Ford's distribution ring in Brooklyn, the Bronx, Manhattan, and Queens, New York. The heroin was apparently of poor quality, and for this or other reasons Ford fell behind in his payments to his principals. This occasioned a number of meetings with Viserto and Rocco in April or May 1975 at which Ford requested that he be given more heroin to sell in order to pay off his debt. At one meeting, Rocco informed Ford that he and Viserto had ways of collecting their money. Ford testified that by mid-1975 he had paid Viserto approximately $800,000 on the 50 kilogram shipment. He still owed approximately $250,000 when he ceased dealing with Viserto, Rocco, and Solce and left the New York area. Ford testified that, at one point, his lieutenants had asked him for guns. When he relayed that request to Viserto, Viserto supplied him with ten handguns, which Ford distributed to his confederates.

Norman Alexander testified that, after some occasional work during 1970 for two of Ford's lieutenants, Jeffrey Jones and Garnet Johnson, the promise of financial gain convinced him to work at selling heroin full-time. Alexander detailed the method of operations utilized by the drug ring and recounted dealings with Jones and Johnson,

another lieutenant named Parks, and appellants Covington, Williams and Payne.[2] He testified that after April 1971, when Jones and Johnson were indicted for possession of heroin in the Supreme Court of Kings County, New York, he and Williams were promoted to fill their places as Ford's chief lieutenants. In that capacity Alexander often received instructions from Viserto, Rocco, or Solce regarding deliveries of heroin, and on several occasions he accompanied Ford to meetings with suppliers at which quantities of heroin were transferred.

The Government also introduced evidence to corroborate the testimony of Alexander and Ford. The admissibility of some of this evidence is challenged on appeal. (1) Against Viserto, Rocco, and Solce, the Government introduced evidence of substantial purchases for cash which they made in 1970-71. (2) Thomas Murray, an admitted drug dealer, was permitted to testify to two heroin transactions in which Viserto participated, and which occurred at about the same time as the alleged conspiracy. In addition, Police Officer Roger Garay of the New York Drug Enforcement Task Force testified to a conversation he *overheard* on October 6, 1977, between Viserto and Rocco, in which Rocco reportedly referred to a "customer" who had been purchasing for the last five years at a rate of "$25,000 a key" and who was, apparently, in trouble. (3) Finally, the Government introduced certified copies of the conviction of Jones and Johnson in New York Supreme Court as evidence that they pos-

2 Johnson and Williams were implicated as partners or lieutenants of Ford who performed major roles in the conspiracy. Covington and Payne were more minor figures. Covington was at first a customer, then an occasional seller of small quantities of heroin received on consignment from Alexander, and finally a sub-lieutenant who worked for Johnson. Payne assisted the conspiracy by permitting storage of heroin shipments in her apartment.

sessed heroin during the period covered by the conspiracy indictment in Count One.

II

Evidence of Cash Transactions

The admission of evidence that Viserto, Rocco, and Solce made substantial purchases for cash in 1970-71 was proper. The Government urged the inference that the use of cash showed that the defendants were engaged in an illegal business—the narcotics conspiracy—while the appellants contended that the cash came from the proceeds of a different illegal venture—gambling. We have held that proof of the availability of cash by defendants with no legitimate occupation is permitted as tending to show that it was derived from ill-gotten gains. *United States v. Tramunti,* 513 F.2d 1087, 1105 (2d Cir.), *cert. denied,* 423 U.S. 860 (1975); *United States v. Falley,* 489 F.2d 33, 38 (2d Cir. 1973); *United States v. Hinton,* 543 F.2d 1002, 1012-13 (2d Cir.), *cert. denied,* 429 U.S. 980, 1051, 1066 and 430 U.S. 982 (1976).

Proof of cash expenditures is not proof of "other crimes" as appellants suggest. It is relevant to the crime on trial. The suggestion that the cash may have come from another illicit activity goes only to the weight, not the admissibility, of the evidence. *United States v. Tramunti, supra.* The relevance is not so farfetched as to make its admission an abuse of discretion by the experienced trial judge. Chief Judge Mishler charged as follows:

> There is testimony that the defendants Viserto, Rocco and Solce had large amounts of cash. You may infer from the existence of large amounts of cash that the large amounts of cash were proceeds or the results

> of illegal activities. The Government argues that the existence of large amounts of cash in this case shows that the defendants Viserto, Rocco and Solce were dealing in narcotics.
>
> The defendants' position is that these large amounts of cash represent proceeds from gambling activities and the money lending business.

Since there was no affirmative evidence that the cash was derived from legitimate business, there was sufficient relevance to the crime charged for the consideration of the jury.

Appellants contend that the acquittal of Solce for income-tax evasion, in the prosecution of which the same cash expenditures were in evidence, amounts to a collateral estoppel against the Government. In this case the prosecution was not bound by the outcome of the earlier prosecution, because the earlier acquittal of the income tax violation did not "necessarily" determine that the cash used was not derived from the narcotics business. *United States v. King,* 563 F.2d 559, 561 (2d Cir. 1977), *cert. denied,* 435 U.S. 918 (1978); *United States v. Cala,* 521 F.2d 605, 608 (2d Cir. 1975).

Appellants contend further that, since Solce had previously been acquitted of income-tax evasion, allegedly on the theory that the cash expenditures were from gambling activity which Solce believed to be non-taxable, the court should have admitted in evidence the verdict of acquittal. A judgment of acquittal is relevant to the legal question of whether the prosecution is barred by the constitutional doctrine of double jeopardy or of collateral estoppel. But once it is determined that these pleas in bar have been rejected, a judgment of acquittal is not usually admissible to rebut inferences that may be drawn from the evidence that was

admitted. Not only does the inference appellants suggest not flow from the judgment of acquittal of Solce, but also a judgment of acquittal is hearsay. The Federal Rules of Evidence except from the operation of the hearsay rule only judgments of conviction, Rule 803(22), not judgments of acquittal.

The further suggestion that the evidence *compelled* the defendants to urge that they were gamblers and that this therefore created a classic case of "confusion and waste of time," is not well-taken. The matter was well within the discretionary management of the trial judge.

The Guns

The trial judge admitted testimony by Ford that when his lieutenants asked him to provide them with guns, he got handguns from Viserto which he distributed to his confederates. This was not error. We have recognized that handguns are tools of the narcotic trade, and that possible prejudice does not outweigh the relevance. The evidence was significant, if Ford was believed, in linking Viserto to the conspiracy and showing its scope. *See United States v. Wiener,* 534 F.2d 15, 18 (2d Cir.), *cert. denied,* 429 U.S. 820 (1976); *United States v. Grant,* 545 F.2d 1309, 1312-13 (2d Cir. 1976), *cert. denied,* 429 U.S. 1103 (1977); *cf. United States v. Ravich,* 421 F.2d 1196, 1204 (2d Cir.), *cert. denied,* 400 U.S. 834 (1970). The judge gave a limiting instruction as well, reminding the jury that gun charges were not involved in this case.

The "Other" Heroin Transactions

Police Officer Roger Garay was permitted to testify to two conversations he overheard, while in civilian clothes, on October 6, 1977. The first conversation Garay overheard

as Viserto and a man later identified as Paul Caiano passed him on the street. Caiano told Viserto "we can't lose him as a customer, we have to make it up to him" and Viserto replied "All right, don't worry." The second conversation occurred between Viserto and Rocco in which Rocco referred to a "customer" who had been purchasing for the last five years at a rate of "25,000 a key" and who, apparently, was in trouble. Both conversations took place near a restaurant owned by Solce, in a neighborhood where Ford had testified he often met with his principals. The Government argued that the use of the word "key"—underworld argot for "kilogram"—indicated that the conversation between Viserto and Rocco related to drug dealings which had taken place during the period of the indictment. The conversation itself took place several days after the indictment when Garay undertook to conduct surveillance of the defendants with the hope of eavesdropping on their conversations. The argument that this related to an inadmissible "other crime" was not raised below and is, therefore, not available here. *United States v. Fuentes,* 563 F.2d 527, 531 (2d Cir.), *cert. denied,* 434 U.S. 959 (1977); *United States v. Braunig,* 553 F.2d 777, 780 (2d Cir.), *cert. denied,* 431 U.S. 959 (1977).

Chief Judge Mishler cautioned the jury that Garay's testimony was admissible "only against Viserto and Rocco." Since the conversation may be read as coming within the scope of the conspiracy, it was properly allowed in evidence, in any event, as an admission by the particular defendants. Even if it were not strictly within the conspiracy charged, the conversation was admissible as a contemporaneous dealing in narcotics. Narcotics is a business, though an illegitimate one, and evidence that the defendants were in the business at a closely related time is rele-

vant, and is not a mere showing of bad character. Fed. R. Evid. 404(b). *See, e.g., United States v. Magnano,* 543 F.2d 431, 435 (2d Cir.), *cert. denied,* 429 U.S. 1091 (1976); *United States v. Torres,* 519 F.2d 723, 727 (2d Cir.), *cert. denied,* 423 U.S. 1019 (1975); *United States v. Conley,* 523 F.2d 650, 652-54 (8th Cir.), *cert. denied,* 424 U.S. 920 (1976). This rule supports the admission of Murray's testimony as well.

III

Rule 16

The only objection to the Garay eavesdropping made below was that the Government prejudiced the defendants by failing to provide pre-trial discovery of notes taken by Garay and by failing to provide pre-trial discovery of Officer Garay's testimony. Fed. R. Crim. P. 16(1)(A) requires the Government, upon request, to permit inspection and/or copying of "any relevant written or recorded statements made by the defendant . . . within the possession, custody or control of the government," as well as "the substance of any oral statement . . . made by the defendant . . . *in response to interrogation* by any person then known to the defendant to be a government agent" (emphasis added). A non-recorded conversation *overheard* by a Government agent whose presence is not known does not come within the latter category. *United States v. Green,* 548 F.2d 1261, 1267 (6th Cir. 1977). The dictum in *United States v. Percevault,* 490 F.2d 126, 129 (2d Cir. 1974), cited by appellants, is inapplicable since it was made before the amendment of Rule 16, effective December 1, 1975. Since Garay made notes of the conversation on a newspaper, it might be argued, nevertheless, that appellants' statements were "recorded" within the first category of discoverable material

covered by Rule 16(a). But because the statement was memorialized originally only in the recollection of a witness, it is not discoverable. *See United States v. Feinberg,* 502 F.2d 1180, 1182-83 (7th Cir. 1974), *cert. denied,* 420 U.S. 926 (1975). No written record was contemplated when the statement was made. *Id.* Garay's notes were nothing more than a hasty reminder to himself of what was said. In any event, there was no prejudice, since Garay's statement was made available to the defense on the eve of trial. *See United States v. Lam Lek Chong,* 544 F.2d 58, 69 (2d Cir. 1976), *cert. denied,* 429 U.S. 1101 (1977).

IV

Duplicitous Counts

Viserto, Rocco, and Solce contend that Counts Two and Three are duplicitous in that each count charges that the defendants both distributed heroin and possessed heroin with intent to distribute it, within the specified time periods. They argue that because of the alleged duplicity some jurors might have convicted appellants for distributing while others might have convicted for possession with intent to distribute, thus raising a question whether there was, in fact, a truly unanimous verdict on either.

Since the alleged duplicitous character of the counts appears on the face of the indictment, appellants could have moved before trial to dismiss the indictment. Fed. R. Crim. P. 12(b)(2). Failure to make the appropriate motion is a waiver. *United States v. Droms,* 566 F.2d 361, 363 (2d Cir. 1977) (per curiam); *United States v. Rodriguez,* 556 F.2d 638, 641 (2d Cir. 1977), *cert. denied,* 434 U.S. 1062 (1978); and *see generally Davis v. United States,* 411 U.S. 233, 243 (1973); *United States v. Kelley,* 395 F.2d 727, 729-30 (2d Cir.), *cert. denied,* 393 U.S. 963 (1968). In any event, the

statute, 21 U.S.C. § 841(a)(1), makes distribution and possession with intent to distribute a single offense. The indictment is in the standard form used to set out the means by which the single offense may be committed. That does not make the indictment duplicitous. *United States v. Astolas,* 487 F.2d 275, 280 (2d Cir. 1973), *cert. denied,* 416 U.S. 955 (1974); *United States v. Lennon,* 246 F.2d 24, 27 (2d Cir.), *cert. denied,* 355 U.S. 836 (1957). And the propriety of this conjunctive pleading has been upheld precisely when the attack involved 21 U.S.C. § 841(a)(1). *United States v. Orzechowski,* 547 F.2d 978, 986-87 (7th Cir. 1976), *cert. denied,* 431 U.S. 906 (1977); *United States v. Herbert,* 502 F.2d 890, 893-94 (10th Cir. 1974), *cert. denied,* 420 U.S. 931 (1975).

In any case there could have been no confusion on the part of the jury because Chief Judge Mishler charged only the elements of possession with intent to distribute and did not charge at all the elements of "distributing." The argument about jury unanimity is accordingly unconvincing.

V

Supplemental Charge

The court's supplemental charge on constructive possession was given in response to a jury request for additional instructions. During the course of their deliberations, the jury delivered to the court a note which read: "We want to hear your charge on this Count [Two]. We would like to hear the law on circumstantial evidence in regard to the verdict so all jurors have this clear in their minds." After a colloquy with counsel concerning the meaning of this note, the trial judge decided that it was best to read it as a request to restate the essential elements of the crime, and to define the various terms in the charge. The Assistant United States Attorney suggested that a charge on actual and constructive possession, which had not been included in the original charge, would be appropriately included in the court's response. The judge determined to poll the jury concerning their desire for a definition of possession. One juror responded in the affirmative, and the judge gave the requested charge.

We find no improper or partial behavior in this. The supplemental charge which the court delivered was responsive to the jury's request. The definition of possession was correct. Considered as a whole, the supplemental charge was balanced and did not display any partiality to the Government's case. Though counsel might have requested a "mere presence" instruction if the defense had been informed in advance that a constructive possession charge was to be used, we cannot agree that "[t]he critical role of good argument was vitiated by the unrequested, unannounced and untimely instruction." Viserto Brief at 37. Counsel had vigorously argued the defense theory that Viserto, Rocco and Solce had only come into contact with Ford through gambling activities; and the prosecution had argued with equal vigor defendants' control over Ford's source of heroin. The charge on constructive possession thus in no way deviated from the path of trial that the parties had already pursued. *Cf. United States v. Martin,* 525 F.2d 703, 707 (2d Cir.), *cert. denied,* 423 U.S. 1035 (1975).

VI

We come finally to the argument of appellants Covington and Payne that the District Court failed to follow the procedure established by Fed. R. Crim. P. 24(c) in dismissing alternate jurors. Rule 24(c) provides that a court may in its discretion direct that not more than six individuals "be

called and impanelled to sit as alternate jurors." Alternates are to replace regular jurors "in the order in which they are called." The Rule further provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

It is undisputed that this procedure was not followed below. Instead, sixteen jurors were impanelled, without any designation as regulars or alternates. Before the jury retired, defense and prosecution were given the opportunity in turn to select jurors to be discharged, until the requisite number of "regular" jurors remained. *All parties stipulated to this procedure before trial* after a full explanation of the procedure by Chief Judge Mishler.

Apparently, this procedure is not uncommon in the Eastern District of New York. The supplemental appendix indicates that at least two of the judges in the District regularly employ this practice, but only if *all* counsel agree. This procedure was challenged but not disturbed in this court's *per curiam* decision in *United States v. Rauch*, 574 F.2d 706 (2d Cir.), *cert. denied*, 99 S. Ct. 110 (1978). We did not, however, expressly consider the validity of the Eastern District practice. We think that the issue remains open and warrants comment.

More than a decade ago, we cautioned that "[t]he absence of benefit being so clear and the danger of prejudice so great, it seems foolhardy to depart from the command of Rule 24." *United States v. Hayutin*, 398 F.2d 944, 950 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968). That case involved the failure to discharge the alternate jurors "after the jury retires to consider its verdict." Rule 24(c). The convictions were affirmed since the court found no prejudice.

Here a benefit is asserted—that the jurors, not knowing who will be chosen, are more likely to stay awake during the

trial. There is no empirical evidence that jurors clearly marked as alternates are less attentive than other jurors. Be that as it may, we commend the judges in the Eastern District who try to be innovative, but we caution again that Rule 24(c) represents a national consensus of bench and bar and ought not be disturbed on a local level.

It is true that the judges who use the method do so only when all counsel stipulate, but one can only speculate on the varying degrees of reticence of counsel to oppose the stated preference of the trial judge. Since we find no coercion or prejudice in the colloquy here and since the stipulation was signed by each defendant and by all counsel after extensive colloquy, there is no reason to upset these convictions. The failure to follow the rule strictly has been waived. *See United States v. Baccari*, 489 F.2d 274 (10th Cir. 1973) (per curiam), *cert. denied*, 417 U.S. 914 (1974). We should say, nevertheless, that we do not favor the amendment of the federal rules of criminal procedure by a general resort to stipulations. Consistency on jury selection, including the method of dismissing alternate jurors, throughout the federal court system, strikes us as desirable in the interest of stability and uniformity.

The procedure used in this case is worthy of consideration by the Federal Judicial Center and the Committees concerned with amendments to the Federal Rules of Criminal Procedure, but unless there is an amendment of Rule 24(c), we believe the Rule should be followed everywhere.

Appellants cite only one case allegedly in support of reversal in spite of a stipulation, *United States v. Lamb*, 529 F.2d 1153 (9th Cir. 1975) (en banc), but that case concerned the substitution of an alternate juror after the original jury had already engaged in extensive deliberations. The court found that there had been no stipulation for the

substitution of the alternate juror. It also held, alternatively, that even if an alternate is made a regular juror *after* deliberations have begun by stipulation, that would not cure the disregard of the mandatory rule. The substitution of an alternate after the jury deliberations have begun is different from our case.

We have considered the other arguments raised by the appellants and find them to be without merit. Accordingly, we affirm the convictions of all appellants.

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